IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 1, 2007 Session

DEBRA M. BARKES ET AL. v. RIVER PARK HOSPITAL, INC., d/b/a RIVER PARK HOSPITAL (TN)

Appeal from the Circuit Court for Warren County
No. 946 Larry B. Stanley, Jr., Judge

No. M2006-01214-COA-R3-CV - Filed December 29, 2008

Wife of patient brought medical malpractice action for the wrongful death of her husband who died at home later in the same day that he was examined in the emergency room. The patient had been examined, diagnosed and discharged by a nurse practitioner without being seen by a physician. The only direct claim against the hospital was whether the hospital was liable because a written policy, which required that every patient presented to the emergency room be seen by a physician, was not followed by the health care providers in the Emergency Department. The jury returned a verdict exonerating all of the individual health care providers directly or indirectly involved with the care of the plaintiff's husband; however, the jury found that the hospital was 100% at fault for his death. The hospital appealed contending the jury's verdict must be set aside because it was inconsistent and irreconcilable. Because the jury found that none of the health care providers were at fault, the only basis for upholding the jury's verdict against the Hospital is upon the doctrine of corporate liability. Tennessee has not adopted the doctrine of corporate liability; therefore, the verdict, exonerating all individual health care providers of fault and finding the hospital 100% at fault, constitutes an inconsistent and irreconcilable verdict. We, therefore, reverse and remand the case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Vacated

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., joined. PATRICIA J. COTTRELL, J., not participating.

C. J. Gideon, Jr., Bryan Essary, and Brian Cummings, Nashville, Tennessee, for the appellant, River Park Hospital, Inc., d/b/a River Park Hospital.

David Randolph Smith and Edmund J. Schmidt III, Nashville, Tennessee, for the appellee, Debra M. Barkes, Individually and As Surviving Spouse of Jewell Wayne Barkes, Deceased.

OPINION

The matters at issue arise out of the untimely death of Wayne Barkes, who died of cardiac arrest at his home on the evening of July 26, 2000. All of the facts that are relevant to the matters at issue occurred on the day of his death. Thus, a thorough review of what occurred on that day is in order.

On the morning of July 26, 2000, Mr. Wayne Barkes was at home clearing land and cutting wood with an ax. Around noon that day, he told his wife that he was experiencing pain in his left forearm and thought he may have broken something in his hand or wrist. A few hours later, sometime after 3:00 p.m., his wife, Debra Barkes, decided his forearm and hand should be examined by a doctor. Because Mr. Barkes did not have a family or primary care physician, they decided to go to the emergency room at River Park Hospital (River Park) in McMinnville, Tennessee; however, they did not go directly to the emergency room. Instead, Mrs. Barkes first delivered some food she had prepared earlier to the home of a friend and then she went with her husband to the hospital.

Mr. Barkes arrived at the emergency room at 4:18 p.m. with complaints of pain in his forearm from his wrist to his elbow. Mr. Barkes reported that he first experienced the pain at noon, while cutting wood with an ax. Mr. Barkes was triaged by paramedic Jeff Jolly. Mr. Jolly took Mr. Barkes' vital signs, which indicated his blood pressure was 130/78, his pulse was 100, and his respiratory rate was 20. He was then placed in a private room in the emergency room to be examined further by the medical staff.

Sherry Kinkade, a Nurse Practitioner[1], was the next to examine Mr. Barkes. Her examination revealed that he was not in acute distress; in fact he was joking with Nurse Practitioner Kinkade during her examination of him. Her chart notes indicate that he had mild tenderness in the left forearm and that he had good strength. Her notes also indicate that Mr. Barkes was not experiencing shortness of breath, he did not complain of pain in his arm above his forearm, and he did not complain of pain in his shoulder, jaw or chest.

At the conclusion of her evaluation, Nurse Practitioner Kinkade diagnosed Mr. Barkes with a strain of his left forearm due to overuse. Pursuant to protocol, Nurse Practitioner Kinkade then consulted with Dr. Rosa Stone, an emergency room physician. They discussed Mr. Barkes' history

[1] "Nurse Practitioners" are "Advanced Practice Nurses." *See* Tenn. Code Ann. § 63-7-126(a). Pursuant to Tenn. Code Ann. § 63-7-126(a), an Advanced Practice Nurse holds a master's degree or higher in a nursing specialty and national specialty certification as a nurse practitioner, nurse anesthetist, nurse midwife, or clinical nurse specialist. They are authorized by statute to use the title "advanced practice nurse" or the abbreviation "APN." Tenn. Code Ann. § 63-7-126(b). Nurse practitioners, when properly certified and licensed by the State of Tennessee, may provide health care under the "supervision" of a licensed physician. A nurse practitioner who holds a certificate of fitness is authorized pursuant to Tenn. Code Ann. § 63-7-123(b)(2) to prescribe and issue "controlled substances listed in Schedules II, III, IV and V of title 39, chapter 17, part 4, upon joint adoption of physician supervisory rules concerning controlled substances pursuant to subsection (d)."

and clinical presentation, her examination of him, her findings and impressions, her diagnosis, and her plan of treatment. During the consultation, Dr. Stone inquired of Nurse Practitioner Kinkade to assure that she had inquired into whether Mr. Barkes had shortness of breath or a previous cardiac history, to which Nurse Practitioner responded affirmatively. At the conclusion of their consultation, Dr. Stone agreed with the diagnosis and discharge plan and signed Mr. Barkes' chart. After receiving discharge instructions from Nurse Practitioner Kinkade, Mr. Barkes was discharged at 4:45 p.m.

Following discharge, Mr. and Mrs. Barkes returned to their home. While at home Mr. Barkes ate pizza and soon thereafter, went to the bathroom where he apparently collapsed on the floor and was found by family members. They immediately called for emergency assistance and Mr. Barkes was transported by ambulance to the emergency room at River Park Hospital. He arrived at the hospital in cardiac arrest at 7:27 p.m. and was subsequently pronounced dead.

One year later, on July 26, 2001, Mr. Barkes' widow, Debra Barkes (hereinafter "Plaintiff"), filed this medical malpractice action against River Park Hospital, Inc. and numerous other defendants, including Nurse Practitioner Kinkade, Paramedic Jolly, Dr. Rosa Stone, Dr. Shelia Milot, Dr. Nigel Fontenot, Dr. Francisco Avila, PhyAmerica (the medical group that employed the physicians who staffed the emergency room), and several entities related to Hospital Corporation of America and TriStar, seeking compensation for the wrongful death of her husband.[2] Prior to trial, all of the defendants, with the exception of River Park Hospital, were voluntarily or involuntarily dismissed, leaving River Park Hospital as the only defendant at trial.[3]

Plaintiff's claims against River Park Hospital went to trial on January 17, 2006. Evidence was presented regarding two conflicting policies that were apparently in effect at the time of Mr. Barkes' death. One was a written policy, No. 001-02-005, which was adopted in 1997 prior to the hospital's utilization of nurse practitioners in the emergency room. The 1997 policy stated that all patients presenting to the emergency room are to be assessed by a physician. The other policy was implemented in January of 1999 when the hospital approved the utilization of nurse practitioners in the emergency room as health care providers. The 1999 policy authorized the utilization of nurse practitioners as "physician extenders," meaning they were health care providers under the indirect supervision of a physician. This policy was approved by the Medical Staff of the hospital, the ER/ICU Committee (which oversees the care in the emergency room and intensive care unit of the hospital), and the Board of Trustees.

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[2]Mrs. Barkes asserted claims individually and as the surviving spouse of Jewell Wayne Barkes.

[3]While this action was pending, the medical malpractice insurance carrier for the River Park physicians, Nurse Kinkade, and PhyAmerica went into bankruptcy. As a result, Mrs. Barkes voluntarily dismissed her claims against those defendants. On May 6, 2003, HCA and TriStar were dismissed by summary judgment. Paramedic Jolly was voluntarily dismissed on September 23, 2005; however, Mrs. Barkes continued to pursue her vicarious liability claim against River Park for Paramedic Jolly's alleged negligence.

The 1997 written policy did not contemplate the utilization of nurse practitioners to assess patients because the hospital had not yet authorized the utilization of nurse practitioners in the emergency room when the 1997 policy was adopted. Although the hospital subsequently adopted a policy authorizing the utilization of nurse practitioners, for the purposes employed on the afternoon of July 26, 2000, when Mr. Barkes arrived at the emergency room, the hospital had not revised the 1997 written policy.

The record is replete with evidence that the 1997 written policy was impliedly amended by the adoption of the 1999 policy, and that the 1999 policy represented the protocol being followed by the hospital, the emergency room physicians, and the staff.[4] Due to the implementation of nurse practitioners as providers, the relevant committees were aware the 1997 policy was no longer applicable. This was confirmed by Dr. Mark Weeks, the Co-Director of the Emergency Department who served on the ER/ICU Committee, who had supervised the care provided in the emergency room since 1999, including the date of Mr. Barkes' visit. Dr. Weeks stated that one of his primary duties was to oversee the utilization of nurse practitioners in the emergency room. He also stated that he did not encourage or expect physicians to see all patients before discharge from the emergency room. To the contrary, he believed the utilization of nurse practitioners to examine, diagnose, and discharge patients without being seen by a physician, just as Nurse Practitioner Kinkade did when she treated Mr. Barkes, was appropriate.

After a week of trial, at the close of all proof, River Park made a motion for a directed verdict on all remaining issues. The court granted River Park's motion on all but two of the claims. The two claims that survived were the negligence claim of corporate liability against River Park for the failure to enforce its written policy and a vicarious liability claim against River Park for the alleged negligence of Paramedic Jolly. Because some of the claims survived, the case went to the jury.

On January 26, 2006, the jury returned a verdict wherein the jury found that none of the individual health care providers involved in Mr. Barkes' care were at fault, including Nurse Practitioner Kinkade and Dr. Weeks; however, the jury found that River Park was 100% at fault due to the hospital's failure to enforce the 1997 written policy that every patient presented to the emergency room would be seen by a physician. River Park subsequently filed various post-trial motions, all of which were denied by the trial court on May 16, 2006. This appeal followed.

River Park appeals contending that the failure of the jury to allocate fault to any individual health care provider precludes recovery against River Park. Specifically, River Park contends the

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[4] The 1999 policy authorizing the utilization of nurse practitioners in the emergency room was adopted in order to enhance the quality of care by having the nurse practitioners evaluate patients with less acute medical needs, while physicians attended to those with more acute needs. The 1999 policy did not, however, remove the physician from the assessment or treatment loop. To the contrary, pursuant to the protocol, the examining nurse practitioner was to bring the patient's chart to the physician who would then evaluate the patient's history, clinical presentation, examination and test results, if any, as well as the nurse practitioner's diagnosis and plan of treatment prior to discharge. If the physician believed the patient should be seen by a physician then that would be done; if not, the physician would authorize the nurse practitioner to discharge the patient without being seen by a physician.

jury's findings are inconsistent and irreconcilable. River Park also contends the trial court erred in (1) refusing to charge the jury with an instruction that River Park could only be liable if one of the individual health care providers was liable; (2) refusing to use a jury verdict form that allowed the jury to consider River Park's fault only if it first found at least one individual health care provider at fault; (3) abandoning its role as thirteenth juror when the jury found that none of the individual health care providers were at fault; and (4) allowing Mrs. Barkes' counsel to make prejudicial statements to the jury.

STANDARD OF REVIEW

Our review of this case is governed by Tenn. R. App. P. 13(d), which permits findings of fact by juries in civil actions to "be set aside only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d). This highly deferential standard of review requires us "to take the strongest legitimate view of the evidence in favor of the verdict, assume the truth of all the evidence in support thereof, allow all reasonable inferences to sustain the verdict and disregard all to the contrary." *Johnson v. Cargill, Inc.,* 984 S.W.2d 233, 234 (Tenn. Ct. App.1998). "Where the record contains material evidence supporting the verdict, the judgment based on that verdict will not be disturbed on appeal." *Reynolds v. Ozark Motor Lines, Inc.,* 887 S.W.2d 822, 823 (Tenn.1994).

Well-settled law requires courts to construe the terms of a verdict in a manner that upholds the jury's findings, if it is able to do so. *Briscoe v. Allison,* 290 S.W.2d 864, 868 (Tenn.1956). We must presume that the jury followed the instructions given. *Perkins v. Sadler,* 826 S.W.2d 439, 443 (Tenn. Ct. App.1991).

ANALYSIS

I.

At the close of all the proof at trial, River Park Hospital made a motion for a directed verdict on all remaining claims. The trial court partially granted River Park's motion, dismissing claims against River Park pertaining to the maintenance of a safe environment, negligent hiring, claims that the hospital was negligent in the establishment of policies and procedures, and claims that it did not properly oversee the care provided in the Emergency Room. The only claim of direct liability against the hospital that survived was whether the hospital was liable for not enforcing the written policies and procedures existing at the time of Mr. Barkes' treatment.[5] That claim arises out of Plaintiff's assertion that the hospital was negligent due to its failure to adhere to the 1997 policy No. 001-02-005, which required "[a]ll patients presenting for treatment in the emergency room [be] assessed by an emergency room physician."

[5] The vicarious liability claim against River Park for the alleged negligence of Paramedic Jolly also survived.

Plaintiff's claim of hospital negligence is based upon what is known as the doctrine of corporate negligence, which has been used to impose liability on a hospital for the breach of a duty of care owed by the hospital directly to the patient. *See*, e.g., *Clark v. Perry*, 114 N.C.App. 297, 442 S.E.2d 57, 65 (N.C. Ct. App. 1994). Under this doctrine, which has been adopted in some states, hospitals owe to patients four types of duties:

> (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Thompson v. Nason Hosp., 591 A.2d 703, 707 (Penn. 1991).

Plaintiff contends the doctrine of corporate negligence has been adopted in Tennessee. We have determined the doctrine has not been adopted in Tennessee and, therefore, Plaintiff's reliance on the doctrine of corporate negligence is misplaced.

Plaintiff erroneously contends this court adopted the doctrine of corporate negligence in *Bryant v. McCord*, No. 01A01-9801-CV-00046, 1999 WL 10085 (Tenn. Ct. App. Jan. 12, 1999), *aff'd on other grounds*, 15 S.W.3d 804 (Tenn. 2000).[6] The doctrine of corporate negligence was not expressly adopted in this court's opinion in *Bryant*.[7] Moreover, it is immaterial whether this court impliedly adopted the doctrine in *Bryant* because our opinion has no precedential value due to the fact the Supreme Court granted permission to appeal and affirmed on grounds other than the doctrine of corporate negligence. *See Patton v. McHone*, 822 S.W.2d 608, 615 n.10 (Tenn. Ct. App. 1991); s*ee also Clingan v. Vulcan Life Ins. Co.*, 694 S.W.2d 327, 331 (Tenn. Ct. App. 1985).

In fact, the Supreme Court did not address the doctrine of corporate negligence in its opinion. Instead, the Court decided the case on the issue of implied consent, holding

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[6] Ms. Bryant sued several defendants including a hospital for negligent implantation of pedicle screws in her spine. *Bryant* at *1. She offered several theories of liability. She contended the hospital should have obtained her informed consent prior to the surgeries implanting the screws. *Id*. at *7. In response, the hospital contended it did not have a legal duty to obtain the patient's informed consent. *Id*. She also contended, relying on the doctrine of corporate negligence, that liability should be imposed "for the breach of a duty of care owed by the hospital directly to the patient." *Id*. at *9 (citing *Denton Reg'l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 950 (Tex. App.1997)). In her appeal from the trial court's summary dismissal of her hospital malpractice claim, Ms. Bryant contended the hospital "failed to monitor and control the use of investigational devices used in surgeries performed at the hospital." *Id*.

[7] In the opinion of this court, we concluded that it was not necessary to "expressly adopt the doctrine of corporate negligence" because "it is already the law of this state that hospitals have a duty to use reasonable care to maintain their facilities and equipment in a safe condition, to select and retain only competent physicians, to supervise the care given to patients by hospital personnel, and to adopt and enforce rules and policies designed to ensure that patients receive quality care." *Bryant*, 1999 WL 10085, at *11.

> that a hospital generally is not required to procure a patient's informed consent to surgical procedures ordered and performed by non-employee doctors. The hospital, however, may assume an independent legal duty to obtain the informed consent of a patient undergoing a procedure that is a part of an investigational study monitored by the FDA. The requisite circumstances necessary to impose this independent legal duty upon the hospital have not been met by the facts presented in this appeal. The trial court's grant of summary judgment for the defendant on this issue of informed consent is affirmed.

Bryant v. McCord, 15 S.W.3d 804, 811 (Tenn. 2000). Because the Supreme Court concurred with the result of our opinion, but on another ground, this court's opinion in *Bryant* has no precedential value except to the parties in the case.[8] *Patton*, 822 S.W.2d at 615 n.10*; Clingan*, 694 S.W.2d at 331. Therefore, Plaintiff's reliance on this court's opinion in *Bryant* is misplaced.

Bryant notwithstanding, we find no record of this state adopting the doctrine of corporate negligence as the law of this state. Nevertheless, we readily acknowledge that hospitals in Tennessee have certain affirmative duties to their patients, as legions of cases have held. *See O'Quin v. Baptist Memorial Hosp*., 184 Tenn. 570, 201 S.W.2d 694, 697 (Tenn. 1947); *Keeton v. Maury County Hosp*., 713 S.W.2d 314, 316 (Tenn. Ct. App. 1986); *Crumley v. Memorial Hosp., Inc*., 509 F.Supp. 531 (E.D. Tenn. 1979), aff'd mem., 647 F.2d 164 (6th Cir.1981); *Prince v. Coffee County, Tennessee*, No. 01A01-9508-CV-00342, 1996 WL 221863 (Tenn. Ct. App. May 3, 1996); *Keeton v. Maury County Hosp*., 713 S.W.2d 314 (Tenn. Ct. App. 1986); *Spivey v. St. Thomas Hosp*., 211 S.W.2d 450 (Tenn. Ct. App. 1947). The affirmative duties addressed in these cases, however, are not entirely consistent with the four rather encompassing duties that arise under the doctrine of corporate liability. For example, in *O'Quin v. Baptist Memorial Hosp.*, 201 S.W.2d 694 (Tenn. 1947), the hospital was found to have a legal duty to exercise reasonable care towards their patients, however, our Supreme Court limited that duty to "known conditions." *Id*. at 697. The Court held that a hospital has "a duty to exercise such reasonable care toward a patient as [the patient's] *known condition* may require and the extent and character depends upon the circumstances of each case.[9] *Id*. (citing 41 C.J.S., *Hospitals*, § 8, p. 349) (emphasis added).

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[8] The court in *Patton* acknowledged, "While this type of disposition leaves the bench and bar guessing about the reasons for the Supreme Court's dissatisfaction with the opinion, *Pairamore v. Pairamore*, 547 S.W.2d 545, 552 (Tenn. 1977) (Henry, J., dissenting), it should be sufficient to dissuade others from relying on the opinion." *Patton v. McHone,* 822 S.W.2d 608, 615 n.10 (Tenn. Ct. App. 1991).

[9] This duty as set forth in *O'Quin* has been cited in situations where known conditions, often mental instabilities, have been present. *See Rich v. Peninsula Psychiatric Hosp., Inc.,* No. 171, 1990 WL 38552 (Tenn. Ct. App. Apr. 6, 1990) (holding "that when a hospital elects to accept a patient with psychiatric disorders and with orders that 'suicide precautions' be taken, the prime responsibility to afford reasonably safe facilities and reasonable attendance to the patient's needs to prevent self injury lies with the hospital and not the physician"); *see also Robertson v. Claiborne County*, No. 39, 1987 WL 28047 (Tenn. Ct. App. Dec. 17, 1987); *Stokes v. Leung*, 651 S.W.2d 704 (Tenn. Ct. App. 1982); *Rural Education Ass'n v. Anderson*, 261 S.W.2d 151 (Tenn. Ct. App. 1953).

A similar duty was stated in *Keeton v. Maury County Hosp.*, 713 S.W.2d 314, 315 (Tenn. Ct. App. 1986), wherein a patient suffering from vertigo fell while attempting to go to the restroom after hospital employees failed to respond to his requests for assistance. This court stated the duty of the hospital was "to exercise such reasonable care toward a patient as his *known condition* may require and the extent and character depends upon the circumstances of each case." *Id*. at 316 (citing *Spivey v. St. Thomas Hospital*, 211 S.W.2d 450 (1947)) (emphasis added). In *Keeton*, the hospital was on notice that the patient had a vertigo problem; therefore, the hospital owed him a duty based upon this *known condition*. *Id*. at 315-16.

Whether a state should adopt into its common law a cause of action against hospitals and other medical facilities referred to as "corporate liability" was the subject of an in-depth analysis by the Supreme Court of Maine in *Gafner v. Down East Community Hosp*., 735 A.2d 969 (Me. 1999).[10] For purposes of its analysis, the *Gafner* court accepted the plaintiffs' assertion that the hospital "failed to have in place at the time of Shannon Gafner's birth a written policy requiring mandatory consultation " with a specialist in high risk births. *Id.* at 976. Although no duty to promulgate such policies existed under the common law of Maine, and the Maine Legislature had not placed such a duty on hospitals, the plaintiffs in *Gafner* asked the court to "recognize a duty on the part of a hospital to adopt rules and policies controlling the actions of independent physicians practicing within its walls." *Id*. In furthering their argument, the plaintiffs in *Gafner* relied on the analysis of the Pennsylvania Supreme Court in *Thompson v. Nason Hosp.*, the same case the plaintiff in *Bryant* relied upon. *Id*. at 977; *see Thompson*, 591 A.2d at 707.

The Supreme Court of Maine credited the Illinois Supreme Court decision in *Darling v. Charleston Community Memorial Hospital* for the adoption of some form of the corporate liability cause of action in some states. *Id*.; *see Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (1965); *see also Pedroza v. Bryant*, 677 P.2d 166, 168 (Wash. 1984) (en banc). The Court also noted that proponents of the corporate liability theory present a number of justifications in its support.[11] The Court went on to recognize that "this evolving theory of liability, however, has not been universally embraced," and that at least one critic condemns it as "misguided economic policy making on the part of the courts" and declares "the cause of action to represent a 'deep pocket' approach," referring to the dissent of Justice Flaherty in *Thompson*. *Id.* at 978; *see Thompson*, 591 A.2d 703, 709 (Pa. 1991). As did Justice Flaherty, the *Gafner* court criticized the majority holding in *Thompson*, stating that

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[10] The discussion of the term "corporate liability" in *Gafner* was limited to "theories of liability predicated upon a more general obligation of hospitals to insure the quality of care within the institution." The court stated that they did not "intend the term to incorporate concepts of vicarious liability or other types of direct liability occasioned by a hospital's breach of a previously recognized duty." *Id*. at 976.

[11] "Most prominent is the concept that hospitals are no longer viewed as the mere physical facilities in which doctors do their work, but are rather viewed as comprehensive healthcare centers that 'provide and monitor all aspects of health care."' *Gafner*, 735 A.2d at 976 (citing C. Elisabeth Belmont, Comment, *Hospital Accountability in Health Care Delivery*, 35 Me. L. Rev. 77 (1983); David H. Rutchik, Note, *The Emerging Trend of Corporate Liability: Courts' Uneven Treatment of Hospital Standards Leaves Hospitals Uncertain and Exposed*, 47 Vand. L. Rev.. 535, 538 (1994)).

> others have concluded that, "[i]n its adoption of a general 'duty to oversee all persons who practice medicine within its walls as to patient care,' the *Thompson* court neither provided guidance as to the extent to which hospitals must now monitor staff physicians, nor did it articulate the standard of care to which hospitals must adhere." [citations omitted].
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> The balancing of interests implicated by the changing nature of hospitals has been undertaken in some depth by the Legislature. Consistent with the growing recognition of an independent duty on the part of hospitals to assure the credentials of physicians practicing with their facilities, the Legislature has considered the relationship between hospitals and physicians and has placed very specific duties upon hospitals. Among those duties is the obligation to assure that "[p]rovider privileges extended or subsequently renewed to any physician are in accordance with those recommended by the medical staff as being consistent with that physician's training, experience and professional competence." 24 M.R.S.A. § 2503(2) (1990). To date, however, the Legislature has not chosen to place upon hospitals a specific duty to regulate the medical decisions of the physicians practicing within the facility. [footnote omitted].
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> Nonetheless, the Gafners would have us incorporate into Maine law a theory of corporate liability for failure to have explicit policies in place controlling the actions of independent physicians. This formulation of the theory of liability has only been recognized by a few jurisdictions.[12] Instead, most courts that have recognized the cause of action referred to as corporate liability have grounded the claim upon the responsibility of the facility to assure that physicians practicing in the facility are properly credentialed and licensed.[13]

Id. at 979. The Supreme Court of Maine then noted that the theory of "corporate liability" had not gained significant acceptance in other jurisdictions or been considered by Maine Legislature; and, the court cautioned that "[c]reating a duty that would place external controls upon the medical judgments and actions of physicians should not be undertaken without a thorough and thoughtful analysis." *Id*.

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[12] *See, e.g., Denton Reg'l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 950 (Tex.App.1997); *Thompson*, 591 A.2d at 707; *Darling*, 211 N.E.2d at 258.

[13] *See, e.g., Elam v. College Park Hosp.*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156, 165 (1982); *Kitto v. Gilbert*, 39 Colo.App. 374, 570 P.2d 544, 550 (1977); *Insinga v. LaBella*, 543 So.2d 209, 211 (Fla.1989); *Mitchell County Hosp. Auth. v. Joiner*, 229 Ga. 140, 189 S.E.2d 412, 414 (1972); *Ferguson v. Gonyaw*, 64 Mich.App. 685, 236 N.W.2d 543, 550 (1975); *Corleto v. Shore Mem'l Hosp*., 138 N.J.Super. 302, 350 A.2d 534, 538 (N.J.Super.1975); *Raschel v. Rish*, 110 A.D.2d 1067, 488 N.Y.S.2d 923, 925 (N.Y.App.Div.1985), aff'd 69 N.Y.2d 694, 512 N.Y.S.2d 22, 504 N.E.2d 389 (1986); *Benedict v. St. Luke's Hosps*., 365 N.W.2d 499, 504 (N.D.1985); *Albain v. Flower Hosp*., 50 Ohio St.3d 251, 553 N.E.2d 1038, 1045 (1990), overruled on other grounds by *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 462-63 (R.I.1993); *Pedroza*, 677 P.2d at 168; *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156, 164 (1981).

Following its thorough analysis, the Supreme Court of Maine declined to create or recognize the corporate liability theory as a cause of action for a number of reasons. First, hospitals in Maine are extensively regulated. *Id*. Second, noting the Maine Legislature had created duties and guidelines for the actions of hospitals in a number of areas, the Court reasoned that before there was "expansion of tort liability into an area that has been significantly controlled by the Legislature, we should allow the Legislature to address the policy considerations and determine whether imposing such a duty constitutes wise public policy." *Id*. The Court went on to state another, and we believe compelling, reason.

> [C]reating a duty on the part of hospitals to control the actions of those physicians who have traditionally been considered independent contractors may shift the nature of the medical care provided by those physicians. In an area as replete with the possibility of unexpected or unintended consequences as this, we should exercise restraint in the use of our authority to create new causes of action. As the concurrence commented in Hottentot, "[w]hen the legislative and the executive branches have the extensive involvement they do in this area and yet have declined to provide judicial remedies" sought by the plaintiffs, "we should likewise stay our hand as a common law court." *Hottentot*, 549 A.2d at 370 (Hornby, J., concurring).

Id. at 979-80. Noting that "there exist serious and unanswered public policy questions regarding the wisdom of requiring hospitals to control the medical judgments and actions of independent physicians practicing within their facilities" the *Gafner* court declined to adopt "a new theory of liability in an area of such significant concern for the public health." *Id* at 980.

We find the analysis and reasoning set forth in *Gafner* most persuasive and, therefore, we are not inclined to adopt the doctrine of corporate negligence in this case.

Having determined that Tennessee has not adopted the corporate negligence doctrine, we find no basis upon which River Park Hospital can be held directly liable to Plaintiff based upon the facts of this case.

II.

We now turn our attention to River Park Hospital's contention that the jury's verdict must be set aside because it is inconsistent and irreconcilable. Specifically, the hospital contends the jury's finding that the hospital was 100% at fault is inconsistent and irreconcilable with the finding that each and every individual health care provider involved in Mr. Barkes' care in the emergency room on July 26, 2000, as well as their supervisors, was not at fault. We agree.

In determining whether a verdict is irreconcilable and inconsistent, it is the duty of the court to give the verdict

> the most favorable interpretation and to give effect to the intention of the jurors if that intention be permissible under the law and ascertainable from the phraseology of the verdict. If after an examination of the terms of the verdict the court is able to place a construction thereon that will uphold it, it is encumbent upon the court to do so.

Hogan v. Doyle, 768 S.W.2d 259, 263 (Tenn. Ct. App.1988) (quoting *Templeton v. Quarles,* 374 S.W.2d 654, 660 (Tenn. Ct. App.1963)) (internal citations omitted). "The . . . jury, on a single set of facts . . . cannot reach two different conclusions of fact and law as expressed in their verdicts which will support valid judgments, unless these opposite, inconsistent conclusions are reconciliable under an applicable rule of law." *Collier v. Davis*, No. 03A01-9301-CV-00047, 1994 WL 27619, at *4 (Tenn. App. Feb. 3, 1994) (citing *Milliken v. Smith*, 405 S.W.2d 475, 477 (Tenn. 1966)). If a jury's verdict is based upon inconsistent findings, it is the duty of the appellate court to reverse and remand the case for a new trial. *Milliken*, 405 S.W.2d at 477 (citing *Penley v. Glover,* 205 S.W.2d 757, 759 (Tenn. Ct. App. 1947)); *see also Concrete Spaces, Inc. v. Sender,* 2 S.W.3d 901, 911 (Tenn.1999).

With the elimination of the claim based upon the doctrine of corporate liability, the only duty upon which Plaintiff may establish liability against River Park was under a theory of vicarious liability, which is directly related to whether quality care was provided by one of the individual health care providers. This theory required Plaintiff to establish, *inter alia*, the applicable standard of care and a breach of that standard of care. However, the jury determined that no one was at fault, with the exception of River Park Hospital.

Medical professionals are judged according to the standard of care required by their profession. *Dooley v. Everett*, 805 S.W.2d 380, 384-85 (Tenn. Ct. App. 1990). "[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." *Id*. at 385. It is evident from the jury's verdict that they concluded the hospital was liable because it breached a duty of care established in the 1997 written policy; however, the fact that the hospital failed to follow its internal policy, without more, may not be sufficient to establish a standard of care. *See Prewitt v. Semmes-Murphey Clinic, P.C.*, No. W2006-00556-COA-R3-CV, 2007 WL 879565, at * 15 (Tenn. Ct. App. March 23, 2007); *see also Land v. Barnes*, No. M2008-00191-COA-R3-CV, 2008 WL 4254155, *13 (Tenn. Ct. App. Sept. 10, 2008) ("This court has previously declined to equate internal manuals or protocols with the applicable standard of care."). In *Prewitt*, the plaintiff, a quadriplegic, sued for medical malpractice and negligent supervision following an injury from a fall while he was waiting to have a lumbar puncture procedure performed. *Prewitt*, 2007 WL 879565, at *1-2. Summary judgment was granted in favor of the defendants, a physician's corporation and a nurses' corporation and its employee. *Id.*

at *15. On appeal, the issue was whether the expert testimony requirements under Tenn. Code Ann. § 29-26-115 had been satisfied. The court noted that

> [P]laintiff did not rely on his own experts' opinions in attempting to establish the standard of care or its breach for nurse practitioners assisting in lumbar puncture procedures, but instead attempted to establish this standard of care through his questioning of Nurses Glover and Avant at deposition with regard to certain internal documents of The Med or Kindred.

Id. at *44. The court found that this was not enough to satisfy the requirements of expert testimony regarding the standard of care and the breach of this standard within a medical malpractice case, as required by statute.

> [W]e believe Plaintiff's reliance upon this vague hospital policy and his questioning of Nurses Glover and Avant in its regard were not sufficient to satisfy the expert testimony requirements of the Tennessee Medical Malpractice Act regarding the applicable standard of care.
>
> First, we note that other states have held that internal hospital policies, although possibly relevant when accompanying competent expert testimony, do not alone conclusively establish the standard of care for a medical procedure. *See, e.g.*, *Moyer v. Reynolds*, 780 So.2d 205, 208 (Fla.Dist.Ct.App.2001); *Pogge v. Hale*, 253 Ill.App.3d 904, 915, 192 Ill.Dec. 637, 625 N.E.2d 792 (Ill.App.Ct.1993); *Luettke v. St. Vincent Mercy Med. Ctr.*, No. L-05-1190, 2006 WL 2105049, at *12-13 (Ohio Ct.App. July 28, 2006); *Wuest v. McKennan Hosp*., 2000 SD 151, 619 N.W.2d 682 (S.D.2000); *Reed v. Granbury Hosp. Corp.*, 117 S.W.3d 404, 414 (Tex.App.2003); *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 529, 636 S.E.2d 416 (Va.2006); *Auer v. Baker*, 63 Va. Cir. 596, 600 (Va. Cir.2004); *Happersett v. Bird*, 222 Wis.2d 624 (Wis.Ct.App.1998).
>
> Furthermore, we believe that the method by which Plaintiff attempted to extrapolate testimony establishing the standard of care, and the nature of questioning of Nurses Glover and Avant in this regard, failed to satisfy the expert proof requirements of Tenn. Code Ann. § 29-26-115 (Supp.2006). Throughout his questioning of these nurses at their discovery depositions, despite later relying on this testimony as expert proof of the standard of care, Plaintiff's counsel did not ask either nurse to define the standard of professional practice for nurses assisting in lumbar puncture procedures in Memphis or similar communities, or to describe their own familiarity with such standard. Instead, questions posed to these deponents by Plaintiff's counsel regarding The Med's policies evince his own belief that these internal standards were equivalent to the relevant standard of professional practice. As a result, rather than

> allow Nurses Glover and Avant express their opinions, he effectively asked them to accede to his own characterization of the applicable standard of care.

Id. at *47-48.

In the case at bar, Plaintiff sought to hold several health care providers and River Park Hospital liable for medical malpractice because Mr. Barkes was seen by a nurse practitioner without being seen by a physician. This argument suggests the hospital breached a standard of care by allowing Mr. Barkes to be examined, treated and discharged by a nurse practitioner without requiring that he be "seen" by a physician. To appreciate the fallacy of this argument, to the extent it suggests a standard of care was violated because a physician did not "see" Mr. Barkes, requires an appreciation of three facts. One, hospitals may not control the "means and methods by which physicians render medical care and treatment to hospital patients." *Thomas v. Oldfield*, No. M2007-01693, 2008 WL 2278512, at * (Tenn. Ct. App. June 2, 2008) (citing Tenn. Code Ann. §§ 63-6-204(f)(1)(A) and 68-11-205(b)(1)(A)). Two, Nurse Practitioner Kinkade and the Emergency Room physician with whom she consulted, Dr. Stone, were not employees of River Park Hospital; instead they were employees of PhyAmerica Physicians, Inc. Moreover, Tennessee Code Annotated sections 63-6-204(f)(1) and 68-11-205(b)(6) preclude hospitals from employing emergency physicians such as Dr. Stone. Three, like other nurse practitioners in Tennessee, Nurse Practitioner Kinkade was authorized to render health care services without being under the omnipresent supervision or direction of a physician.

The quasi-independent role of nurse practitioners in providing health care in Tennessee is recognized in the applicable health care regulations, as the testimony in this case affirms. In Tennessee, a Nurse Practitioner is an "Advanced Practice Nurse." *See* Tenn. Code Ann. § 63-7-126(a). Chapter 0880-6 of the Rules and Regulations of the Tennessee Board of Medical Examiners, titled, "Rules and Regulations Governing the Utilization and Supervision of the Services of a Nurse Practitioner," as well as the evidence in the record before us, establish the fact that the role of a Nurse Practitioner in the delivery of health care is quite distinct from the historical role of nurses.

Regulations governing the services to be rendered by a nurse practitioner expressly contemplate that the nurse practitioner function with a degree of autonomy. This is evident from the statement of intent in the rules, wherein it is stated, it is "the intent of these rules to maximize the collaborative practice of certified nurse practitioners and supervising physicians in a manner consistent with quality health care delivery." Rule 0880-6-.02. In order to maximize the utilization of the nurse practitioner, the rules specify that the physician's "supervision" of the nurse practitioner "does not require the continuous and constant presence of the supervising physician; however, the supervising physician must be available for consultation at all times or shall make arrangements for a substitute physician to be available." Rule 0880-6-.02(2). Pursuant to these rules, a licensed physician is to be identified as having accepted the responsibility for supervising the nurse practitioner, and the physician serving in such capacity is defined as the nurse practitioner's "supervising physician." Rule 0880-6.01(4).

The regulations expressly provide that the nurse practitioner is to render his or her professional services pursuant to "protocols," which are defined as "written guidelines for medical management developed jointly by *the supervising physician* and *the certified nurse practitioner*." Rule 0880-6.01(3) (emphasis added). For purposes of the issue presented, we find it significant that the regulations expressly require that the protocols "shall be jointly developed and approved by the supervising physician and nurse practitioner," Rule 0880-6.02(5)[14], and "*the supervising physician shall be responsible for ensuring compliance with the applicable standard of care* under (5). Rule 0880-6.02(6) (emphasis added). Based upon the foregoing, it is apparent the hospital has no direct role in establishing the required protocols related to health care services rendered by nurse practitioners and the hospital is not the supervisor of the nurse practitioner.

Although a physician is required to serve as the supervisor of the nurse practitioner, the regulations do not require the supervising physician to be omnipresent. Moreover, the supervising physician is not required to make a personal review of the historical, physical, and therapeutic data when a patient is being examined by a nurse practitioner. *See* Rule 0880-6-.02(2)(7). To the contrary, the supervising physician is only required to personally review twenty percent of charts monitored or written by the nurse practitioner, and the supervising physician has thirty days within which to review them. Rule 0880-6-.02(2)(8). There are four principal exceptions to the foregoing rule: "(1)[w]hen medically indicated, (2)when requested by the patient, (3)when prescriptions written by the certified nurse practitioner fall outside the protocols, and (4)when a controlled drug has been prescribed." If one of these exceptions occurs, the supervising physician is to make a personal review, at least once every ten business days, of the historical, physical, and therapeutic data, and shall certify by signature that the physician has reviewed the chart of any patient within thirty days. Rule 0880-6-.02(2)(7).

Several witnesses who testified in this case put the foregoing rules and regulations in the context of a Tennessee emergency room. They stated that it was consistent with the applicable standard of care for a nurse practitioner in an emergency room in Tennessee to assess, diagnose, treat, and discharge a patient without a physician actually seeing the patient. One of River Park's expert witnesses, nurse practitioner Ms. Jennifer Ezell, N.P., testified that River Park Hospital's use of nurse practitioners in the Emergency Room in July of 2000 was a reasonable and acceptable use of nurse practitioners under the standard of care applicable to McMinnville or similar communities, including in cases such as Mr. Barkes where the physician will not actually see or lay hands on the patient.

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[14] Rule 0880-6-.02(5) provides that the "protocol"

> (a) Shall be jointly developed and approved by the supervising physician and nurse practitioner; (b) Shall outline and cover the applicable standard of care; (c) Shall be reviewed and updated biennially; (d) Shall be maintained at the practice site; (e) Shall account for all protocol drugs by appropriate formulary; (f) Shall be specific to the population seen; (g) Shall be dated and signed; and (h) Copies of protocols and formularies shall be maintained at the practice site and shall be made available upon request for inspection by the respective boards.

In pertinent part, Nurse Practitioner Ezell testified as follows:

Q. Would an urgent patient be appropriate for a nurse practitioner to see, evaluate and treat in River Park Hospital during July 2000?
A. Absolutely.
Q. Was Mr. Barkes an appropriate patient for Ms. Kinkade to see, evaluate and treat when presented, went through triage, and then came back into the ER iteself?
A. Yes, he was.
Q. The use of nurse practitioners – and the jury has heard of the process in place in July 2000 at River Park Hospital and how nurse practitioners see patients consult with the physician, a determination made on whether additional treatment is necessary or whether discharge is appropriate, and that under some circumstances such as this case the physician will not actually see or lay hands on the patient.
Is that consistent with what you saw in the medical records and your review of the depositions and things?
A. Yes.
Q. Is that a reasonable and acceptable use of nurse practitioners under the standard of care that would be applicable in July 2000 to McMinnville or similar communities?
A. Yes, absolutely.

The testimony of Nurse Practitioner Ezell was supported by that of Dr. Kevin Bonner, who is Board Certified in Emergency Medicine, and serves as a Staff Physician in the Emergency Department at Baptist Hospital in Nashville, Tennessee, and at Middle Tennessee Medical Center in Murfreesboro, Tennessee. He testified that the care provided to Mr. Barkes, including the evaluation and the treatment he received from Nurse Practitioner Kinkade during his first visit on July 26, 2000, was appropriate under the circumstances.[15] Randy Spivey, R.N., also testified that River Park Hospital's utilization of nurse practitioners in July of 2000 was an appropriate process.

We acknowledge that plaintiff's expert witness, Dr. Roy Keys, testified that the hospital had a written policy that stated "the patients will be seen by a physician or will be evaluated, there was another term, basically the physician needs to lay hands on the patient" and that the policy was breached because Mr. Barkes was not "seen" by a physician, and that Dr. Keys believed it would have made a difference if a physician had seen Mr. Barkes due to his belief that "the appropriate question would have been asked to elicit, not that the patient volunteered but what through being asked, to elicit some of the things that we might need to know as physicians to tell us, yes, this is a

[15] Dr. Bonner was asked, "Just in general, do you believe that the care provided to Mr. Barkes, evaluation and the treatments provided, offered to Mr. Barkes during his visit of July 26, the first visit, July 26, 2000, do you believe that was appropriate, that care, evaluation, they were appropriate under the circumstances, sir?" His answer was, "Yes, it was."

cardiac event versus not." However, as discussed above, the written policy alone is not sufficient to establish a standard of care; and, even if the written policy was held to be the standard of care, the verdict is irreconcilable and inconsistent due to the jury's finding that each and every individual health care provider that Mr. Barkes came into contact with on the day of his death was not at fault. If the written policy established the standard of care, and these health care providers clearly did not adhere to the 1997 policy, then they should have been found in breach of that standard. Yet, the jury absolved them of guilt. Based on our finding that the doctrine of corporate negligence is not the law in Tennessee, and the jury's finding that the individual health care providers were not at fault, while holding River Park Hospital 100% at fault, we determine that the jury verdict is irreconcilable and inconsistent.

Considering the foregoing, specifically that none of the health care providers who were directly or indirectly involved in the care of Mr. Barkes were found to be at fault, we have determined that the jury reached two different conclusions of fact and law that are opposite, inconsistent and irreconcilable under applicable law. Because we have determined the jury's verdict was based upon inconsistent and irreconcilable findings, it is our duty to reverse and remand the case for a new trial. *See Milliken*, 405 S.W.2d at 477 (citing *Penley,* 205 S.W.2d at 759); *see also Concrete Spaces, Inc.,* 2 S.W.3d at 911.

III. CAUSATION

River Park also contends there was insufficient evidence of causation because all of the health care providers involved in Mr. Barkes' care were exonerated. According to River Park, there can be no causal connection between the hospital's failure to enforce its policy and Mr. Barkes' death because the jury found that none of the individual medical providers' actions or inactions caused Mr. Barkes' death.

Under Tennessee Code Annotated section 29-26-115, the plaintiff is required to prove that the defendant's negligent act or omission caused injuries that would have not otherwise occurred. Tenn. Code Ann. § 29-26-115(a)(3) (Supp. 2007). Plaintiff's main contention in this case is that Mr. Barkes's death would have been prevented had he been "seen" by a physician. Because we have reversed and remanded this case for a new trial, we find this issue is mooted pending re-trial of this case.

IV. PREJUDICIAL STATEMENTS

For its final issue, River Park contends Plaintiff's counsel made improper and prejudicial arguments to the jury for the purpose of influencing and prejudicing the jury, so as to affect the verdict.[16] As with the issue of causation, this issue is mooted because we are required to reverse and

[16]Some of the statements complained of include:

(continued...)

remand this case for a new trial. Nevertheless, on remand counsel and the court should be mindful of the propriety of arguments, counsel should avoid improper argument, and counsel should make timely objection to any improper argument, in which event the trial court may provide a curative instruction, if appropriate.

V. CONCLUSION

The judgment of the trial court is reversed and this case is remanded for a new trial. The costs of appeal are assessed against Plaintiff, Debra M. Barkes.

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FRANK G. CLEMENT, JR., JUDGE

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[16](...continued)

[I]f the proof and the evidence shows Mr. Barkes died of a heart attack is more right than wrong, she prevails.

. . . .

How you decide this case will be talked about for years. This will be more than the buzz in the courthouse. This will go way beyond Warren County. Your verdict will be heard from one end of this state to the other. And it will impact the operation of hospitals on two issues; on how hospitals deal with their policies, and whether patients that go into the emergency room see a doctor.

. . . .

Debra Barkes' loss is double the children's loss. Fixing an amount of money you know, you're the ones that determine. I suggest to you that you determine a minimum amount of what is acceptable, and then decide from there. I suggest to you that a million dollars for each child and two million dollars for Debra Barkes is an appropriate amount of compensation.